**Equitable Gas Company, an Operating Division of Equitable Resources, Inc. *and* James G. McHale *and* International Brotherhood of Electrical Workers, Local 1956, AFL–CIO–CLC.** Cases 6–CA–21147–2 and 6–CA–21182

July 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 29, 1989, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief. Charging Party McHale filed a response brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent that they are consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals during a July 1988 meeting. The judge recommended dismissal of the complaint's allegations that the Respondent disciplined and discharged employee James G. McHale in violation of Section 8(a)(4), (3), and (1) of the Act. The judge further recommended dismissal of the complaint's allegations that the Respondent implemented ''Appearance Guidelines'' in violation of Section 8(a)(4), (3), and (1) of the Act. Finally, the judge recommended dismissal of the complaint's allegation that the Respondent refused to bargain with the Union before implementing ''Appearance Guidelines'' and thereby violated Section 8(a)(5) of the Act.

We agree with the judge that the Respondent threatened employees in violation of Section 8(a)(1) of the Act. For reasons that follow, we find, contrary to the judge, that the Respondent also violated Section 8(a)(5), (3), and (1) of the Act.

## I. FACTS

The Respondent, a public utility engaged in the transmission, distribution, and sale of natural gas, employs about 900 employees represented by 6 unions. The Respondent has recognized the Union involved here as the representative of certain of its employees since 1952.

### A. *McHale's Union Activity and Appearance*

James G. McHale has been employed by the Respondent for 29 years. He is a credit fieldman and his duties include the investigation of thefts of gas from the Respondent. Since the early 1970s, McHale has had long hair and a full beard.

As of 1989, McHale was on the Union's executive board, was a chief steward, and the steward for the credit field division.[2] From 1978 until September 1987, McHale was the Local's president. In the last 18 years McHale has participated in the handling of 500 grievances and during the last several years has presented most of the Union's cases at arbitration.

In early June 1988, McHale presented a grievance regarding plumbers' inspection calls at arbitration. During the arbitration hearing the parties reached an oral agreement, but McHale then demanded that a liquidated-damages clause be added to the agreement. The Respondent's president, Milantoni,[3] testified that he became upset with McHale over this incident because what McHale did ''wasn't honest'' and McHale was not ''honorable.''[4]

Subsequently, in a telephone conversation with Union President McDowell, the Respondent's manager of labor relations Hardman stated that Milantoni was ''incensed'' over McHale's handling of the arbitration and settlement of the grievance on the plumbers' inspection calls. Hardman also stated to McDowell that he (Hardman) felt that ''a lot of our problems stemmed from McHale.'' Hardman admitted stating to McDowell that ''McHale seemed to make an inordinate number of key decisions.''

In July 1988 the Respondent convened a meeting of management and union officials. At this meeting, Hardman addressed the group and criticized union officials for certain of their actions. As found by the judge, based on credited testimony, Hardman, in expressing his complaints about union actions, referred to some of the activities directly attributable to McHale. Hardman complained that the Union opposed all the programs that the Respondent tried to implement and involved the Respondent in excessive Board litigation. He stated that unless management got a more cooperative approach from the Union, many jobs were ripe to be eliminated by automation and that the Respondent would exercise contractual rights to contract out unit work. Hardman also said that the Respondent would insist in future negotiations on the elimination of dues-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] McHale testified that he had been the chief steward since 1978 and had been an executive board member since September 1987.

[3] Milantoni has held the position of president since July 1, 1988. Prior to that he was vice president of gas operations.

[4] The Union later agreed to sign the original agreement, without the liquidated-damages clause.

checkoff and union-security provisions. Further, he stated that the Respondent would begin to communicate directly with unit employees.

### B. *The Appearance Guidelines*

For many years the job descriptions of credit fieldman, customer service representative, and meter reader included a qualification that the employees have a ''businesslike conventional appearance.'' This requirement, however, had not been enforced,[5] according to the Respondent's management and to the November 4, 1987 memorandum discussed below.

The Respondent's manager of customer service and information, Vecchio, has held her position since October 1, 1987.[6] She stated that when she began her current position she noticed that on some days employees in the customer service department would dress in a businesslike manner and on other days the employees would dress ''inappropriately.'' Vecchio stated that most of these employees were not seen by the public and that those who greeted customers did not wear inappropriate clothing. Further, employees who normally did not have customer contact were advised ahead of time if customer contact would be required. Those employees then dressed appropriately. Vecchio generally assigned people as needed and therefore asked Director of Customer Service Nolan what she could do to enforce the job descriptions' requirement for a businesslike appearance.

According to Nolan, although he did not start work in customer service until October 1, 1987, he discussed with Milantoni in late August 1987 the appearance and dress of some of the employees within the building.[7] After he reported to customer service, he saw employees inappropriately dressed and decided in mid-October that he wanted to implement appearance guidelines. At that time he was not aware of any customers' complaints regarding employee appearance. He discussed the idea of appearance guidelines with the Respondent's manager of labor relations, Hardman.

A memorandum, dated November 4, 1987, from Hardman to Nolan discussed various factors regarding an appearance policy, including the racial connotations of a rule against beards. The memorandum also noted that appearance control would probably be challenged by the Union as ''a unilaterally imposed change in 'working conditions' and/or as an unwarranted extension of management's rights.'' The memorandum also contains the following statement:

> Hopefully, our ultimate definition and/or code will be reasonable and address the extremes. As you know, we have one Credit Fieldman who presents a rather unorthodox appearance and who . . . will argue that his appearance is an asset in eliciting information.

Nolan acknowledged (as did Hardman) that this statement referred to McHale.

On December 9, 1987, Nolan met with the Union's president, McDowell, and the Union's vice president, Redinger.[8] The Union was to appoint a committee to meet with a management committee regarding the guidelines. The Respondent made clear that the guidelines were not negotiable and that management only wanted the employees' input. According to Nolan they also discussed beards and problems that blacks can have with shaving.[9]

Nolan testified that he did not give the management committee any directive other than ''to define reasonable businesslike appearance.'' When he reviewed a draft of the appearance guidelines in March 1988 he added a requirement that certain employees wear a dress shirt and tie. Hardman testified that he communicated with Vecchio, who was the head of the appearance guideline committee, and gave her guidance regarding the guidelines.

The Respondent's president, Milantoni, testified that in 1985 and 1986, the Respondent had been criticized by the Pennsylvania Public Utility Commission, had been fined, and had received negative media coverage. Milantoni stated that as a result the Respondent instituted many new programs, including remodeling the first floor of its premises at one location and moving the customer service department to that floor. Milantoni testified that it was his view that the appearance of the employees, ''particularly in the customer service department, had a great deal to do with the negative image of the company that was being perceived both in the press and by the Bureau of Consumer Services.'' On cross-examination Milantoni admitted that he was not aware of any negative publicity that the Respondent had received related to employee appearance. He stated, however, that he had received ''unofficial'' complaints regarding McHale's appearance from 1986 through 1988, which he conveyed to Nolan. News clippings show that the commission's criticism and the media coverage focused on the Respondent's ''handling of customer billing, problem mediation and customer complaints.'' Milantoni denied

[5] In 1972 the Respondent apparently tried to enforce restrictions on McHale's hair and beard, and there was some type of settlement reached in a case before the Pittsburgh Human Relations Commission regarding this issue.

[6] It is unclear from Vecchio's testimony whether employee appearance had been discussed in earlier management meetings.

[7] Nolan stated that he became aware, in late August or early September 1987, that he would be reassigned to the customer service department.

[8] At the time of the hearing Redinger was the vice president and acting president of the Union, as McDowell was on a 2 months' leave of absence from the Union.

[9] There is conflict in the testimony, unresolved by the judge, as to whether anything regarding shaving, beards, or hairstyles was discussed with the Union prior to the issuance of the final draft of the appearance guidelines. Assuming for argument's sake that restrictions on hair and beards were discussed earlier, it would not affect our decision for the reasons discussed in fn. 18, infra.

making any suggestions that were to be included in the guidelines.

The appearance guidelines, dated June 27,[10] became effective on July 1. These guidelines discussed the appearance requirements for three categories of employees: (1) uniformed, (2) nonuniformed—no contact with customers, and (3) nonuniformed—contact with customers. Included in the requirements for each category of employee was this statement: ''Extreme appearance such as unkempt, bushy facial hair or unconventional hair style is unacceptable.''

### C. *McHale's Discipline and Discharge*

After the Respondent implemented its appearance guidelines, some employees were counseled concerning their appearance but only McHale was disciplined.[11] McHale's discipline was pursuant to progressive discipline and was as follows: (1) July 18, 1988, a verbal warning; (2) July 20, 1988, a written warning; (3) July 25, 1988, a 1-day suspension; (4) July 29, 1988, a 10-day suspension; (5) August 16, 1988, a 30-day suspension; and (6) October 31, 1988, discharge.[12]

## II. DISCUSSION AND ANALYSIS

### A. *Deferral*

The judge refused to defer this case to arbitration, and the Respondent excepts. We agree with the judge. As stated by the judge, deferral is inappropriate where, as here, the complaint alleges violations of the Act that are ''closely intertwined with an allegation of violation of 8(a)(4) of the Act.'' The Board does not defer alleged violations of Section 8(a)(4) to private dispute resolution.[13]

### B. *Hardman's Speech*

The judge found that Manager of Labor Relations Hardman, in his July 21 speech, threatened employees with reprisals for their union activities. The Respondent excepts, arguing that the judge drew an incorrect inference from the facts. We agree with the judge. Hardman surely drew a connection between the union officials, including McHale, continuing their efforts to represent employees vigorously and the Respondent's implementation of various adverse actions. Thus, Hardman's remarks violated Section 8(a)(1) of the Act.[14]

### C. *Discrimination as to McHale*

The complaint alleged that the Respondent implemented the appearance guidelines because McHale and other unit employees engaged in union and other protected concerted activities, and progressively disciplined and discharged McHale for the same reasons.[15]

In *Wright Line*,[16] the Board set forth its test of causation for cases alleging violations of the Act that turn on employer motive. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

The judge concluded that ''there is no evidence'' that any protected activities by McHale ''had engendered in Respondent that degree of animus which would cause an employer to discriminate against an employee,'' citing *Fibracan Corp.*, 259 NLRB 161 (1981). The judge also stated that assuming ''a prima facie case existed, it is more readily inferable that Respondent was motivated by a simple desire to get McHale . . . to present a nonbizzare appearance.'' The judge found that the Respondent had met any burden imposed by *Wright Line* and that the General Counsel had failed to rebut the Respondent's evidence ''that it wanted a better image projected by all of its employees.'' The General Counsel has excepted to the judge's conclusions and we find merit to his exceptions.

Contrary to the judge, we find substantial evidence that the Respondent's actions in regard to the appear-

[10] The guidelines were given to the Union on June 13. The Respondent argues that the guidelines were given to the Union at an earlier date. A cover letter sent to the Union by the Respondent's manager of customer service and information, however, was dated June 13 and states that the appearance guidelines were enclosed.

[11] There is no evidence that any other employee presented as ''unorthodox'' an appearance as McHale, nor is there evidence that any other employee failed to comply with the guidelines after counseling. During the course of the discipline the Respondent gave McHale time off, with pay, to have his beard and hair cut. Thereafter, according to the Respondent's manager of labor relations, Hardman, he noticed some difference in McHale's appearance but McHale ''still presented the same general unorthodox position [sic].'' Hardman then suggested that he would propose to Nolan and Milantoni that McHale be given a 30-day period in which to gradually adjust his beard and hair. McHale responded ''that he was not going to trim his beard or his ponytail any further.''

[12] An April 1989, arbitrator's award awarded McHale reinstatement without backpay.

[13] See *International Harvester Co.*, 271 NLRB 647 (1984).

Member Oviatt usually would consider the arbitrator's decision in relation to the allegations of violations of Sec. 8(a)(3) and (5). Here, however, he finds that the arbitrator's statement that ''[W]here the agreement . . . contains . . . a broad management rights clause, arbitrators have universally recognized that an employer has the right to formulate and enforce company rules as an ordinary and proper means of maintaining discipline and efficiency and/or directing the conduct of the work force'' is far too broad and thus repugnant to the policies of the Act. He therefore will not consider the arbitrator's decision on the issue of whether the Union has waived its right to bargain over the implementation of the appearance guidelines.

[14] The judge's factual findings regarding this violation were based on Hardman's outline of his speech as well as Hardman's testimony.

[15] The complaint alleged that the Respondent violated Sec. 8(a)(4) of the Act by implementing appearance guidelines and taking disciplinary action against McHale because he filed unfair labor practice charges and gave testimony to the Board, including, but not limited to, Case 6–UC–291. The judge found, and we agree, that there is no evidence that the Respondent knew, at the time the appearance guidelines were given to the Union, that McHale was going to present the unit clarification petition at the hearing held June 28, 1988.

[16] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

ance guidelines and the disciplining of McHale were motivated by animus toward McHale.[17] As the judge found, the Respondent knew of McHale's extensive union activities and had—particularly during 1988—expressed hostility toward that activity. President Milantoni, in June, expressed considerable resentment toward McHale's handling of the plumbers' inspection calls arbitration. In July, Hardman, during a speech that we have found violated Section 8(a)(1) of the Act, criticized several union actions in which McHale was prominently involved. Although Hardman did not mention McHale by name, his remarks clearly referred to union actions undertaken by McHale.[18] Although the Respondent's expressions of hostility occurred in part after the implementation of the appearance guidelines,[19] the hostility was directed at union activity—including particularly that of McHale—that occurred over a long period and well before the implementation of the appearance guidelines. Overall, the comments of the Respondent's management officials show that the Respondent was hostile to the Union's opposition to many of the Respondent's programs and that the Respondent viewed McHale as a key motivator in the Union's stance on these disputes. Based on the foregoing, the General Counsel established a prima facie case that the Respondent implemented the appearance guidelines and disciplined McHale because of McHale's active and vigorous pursuit of union positions.[20]

In its defense, the Respondent argues that it had legitimate reasons for implementing the appearance guidelines and disciplining McHale. To establish its defense, the burden on the Respondent was that of ''an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.'' *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.

The Respondent states that it implemented the appearance guidelines in response to criticism in 1985 and 1986 by the Pennsylvania Public Utility Commission, as well as in response to negative coverage by the media.[21] There is no evidence, however, that any of the criticism was directed toward employee appearance. Rather, the criticism was directed at the Respondent's allegedly poor customer service. The Respondent contends that the appearance guidelines were just a part of an overall effort to respond to the criticism and create a better image. Both Vecchio and Nolan claimed that they were concerned because customer service employees were coming to work casually dressed. Yet Vecchio stated that the employees who had face-to-face customer contacts came to work dressed appropriately and she proposed guidelines to increase her scheduling flexibility. Nolan denied that McHale was the reason for the appearance guidelines, and also testified that there were no directives given to the committee which drew up the appearance guidelines other than to define ''a reasonable businesslike appearance.'' Milantoni first testified that he thought appearance guidelines were ''an excellent idea'' because he felt that employee appearance contributed to the criticism which the Respondent received. He later admitted that he did not believe that employees' appearance contributed to that criticism. Milantoni stated he had conveyed complaints to Nolan regarding McHale's appearance. Nolan denied being aware of any customer complaints regarding employees' appearance.

Antiunion motivation may reasonably be inferred from the inconsistencies between the employer's proffered reason for an adverse action and other actions of the employer. *Turnbull*, supra at 297, citing *NLRB v. Evans Packing Co.*, 463 F.2d 193, 195–196 (6th Cir. 1972). Here, the Respondent's varying accounts of why it needed and implemented its appearance guidelines, including particularly the hair and beard restrictions, cast doubt on the Respondent's rebuttal case. The Respondent has failed to establish that the appearance of its employees, as opposed to the customer service offered by the Respondent, had caused negative

[17] Antiunion motivation may reasonably be inferred from various factors including an employer's expressed hostility toward a union together with its knowledge of the employee's union activities. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986), and cases cited there.

[18] Hardman testified that during his remarks he ''made the comment that we do not perceive the problem with this unit as resting with the employees.'' Hardman stated that ''we had a very competent and cooperative and loyal work force.'' He further stated ''that the employees had given the signal by the change of officers in the last election, that they were tired of confrontation, and that Mr. McDowell had, in fact, run for office generally on that theme and that campaign promise.'' Considering that McHale had been the Union's president until 1987, coupled with the remark that Hardman made to McDowell that McHale was still making ''an inordinate number of key decisions,'' it is clear that Hardman was expressing his distaste for McHale's leadership of the Union.

[19] Similarly, we recognize that implementation of appearance guidelines was being considered by the Respondent's management as early as August 1987 and that Director of Customer Service Nolan testified that beards were discussed with the Union in the December 9, 1987 meeting. The Respondent's expressions of resentment, however, were not confined solely to events in 1988 but rather related to events occurring over a longer period and during McHale's leadership of the Union. Also, the Respondent admitted that in Hardman's November 1987 memo, discussing the appearance guidelines, Hardman singled out McHale's appearance.

[20] In *Fibracan*, supra, cited by the judge, the only evidence of animus toward the union was statements made by two supervisors, on separate occasions. Both conversations were between the supervisor and a single employee. Further, there was evidence that the plant manager displayed a neutral attitude toward the union. Here, on the other hand, the Respondent's high-level management openly displayed hostility toward the Union's activity and toward McHale's activity on behalf of the Union.

[21] The coverage in the media of the criticism received by the Respondent from the commission was in the late summer and early fall of 1987.

publicity and provoked the criticism of the Respondent.

Accordingly, we reject the Respondent's contention that it would have implemented the appearance guidelines, and disciplined and discharged McHale, even in the absence of McHale's and other employees' union activities.[22] Surely, McHale is a nonconformist——as reflected by both his appearance and the way he conducted himself as a union official. Indeed, he was a thorn in the Respondent's side. Yet McHale had successfully performed his job for many years despite his unconventional appearance. In 1987 and 1988, as reflected in Hardman's and Milantoni's remarks, the Respondent had become increasingly frustrated by the Union in general and McHale in particular. By implementing its appearance guidelines containing the restrictions on hair and beards, the Respondent attempted to retaliate against McHale by forcing him to choose between his appearance and his job.

Although the Respondent has demonstrated its concern with responding to the criticism of the Pennsylvania Public Utility Commission, it has failed to establish that it would have implemented its appearance guidelines with the restrictions on hair and beards in the absence of McHale's and other employees' union activities. We conclude therefore that the Respondent's implementation of its appearance guidelines, as well as its discipline and discharge of McHale pursuant to those guidelines,[23] violated Section 8(a)(3) and (1) of the Act.[24]

### D. *Refusal to Bargain*

The complaint alleges that the Respondent refused to bargain with the Union by unilaterally implementing the ''Appearance Guidelines'' in violation of Section 8(a)(5) of the Act.[25]

The judge found that McHale and the Union's International representative, Rossa, had both ''acknowledged that Respondent has the right to impose 'reasonable' disciplinary rules.'' Thus, he concluded that—because of the Union's ''admissions''—the Respondent was privileged to act unilaterally and was relieved of the obligation to show that the Union had ''consciously waived its right to object to unilateral implementation of disciplinary work rules.'' The judge therefore recommended dismissal of the allegation that the Respondent violated Section 8(a)(5) of the Act. The General Counsel has excepted. We find merit in these exceptions.

The Board stated in *Southern Florida Hotel & Motel Assn.*:[26]

> Work rules, particularly where penalties are prescribed for their violation, are generally covered by the phrase ''other terms and conditions of employment'' as set forth in Section 8(d) of the Act, and are consequently mandatory subjects of collective bargaining [citation omitted]. Thus, an employer violates Section 8(a)(5) of the Act if, during the term of a collective-bargaining agreement, it implements, without first having bargained with its employees' collective-bargaining representative over the matter, changes in its employees' work rules. However, a labor organization may waive its statutory right to be notified and consulted concerning a change in working conditions.

In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), the Court stated that ''we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.'' For a union to waive its right to bargain over a term or condition of employment not contained in the collective-bargaining agreement, the matter ''must have been fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter.'' *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). In determining waiver, we must consider extrinsic evidence bearing on the parties' intent, including bargaining history and past practice under the contract. See *Indianapolis Power & Light Co.*, 291 NLRB 1039, 1040–1041 (1988), enfd. 898 F.2d 524 (7th Cir. 1990).

Applying these principles to this case, we turn first to the testimony of McHale and Rossa. On cross-examination McHale was asked whether, as a union officer, he understood that the labor agreement gave the company the right to establish legitimate work rules. McHale responded ''[o]ur union believes that the company has the right to establish legitimate work roles [sic], yes.'' Rossa, on cross-examination, was asked

[22] An employer rebuts the prima facie case ''by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well [as the protected conduct] and that the employee would have lost his job in any event.'' *Transportation Management Corp.*, supra, 462 U.S. at 400.

[23] The Board has held that an employer may not establish a legitimate basis for discipline or discharge based on unlawful disciplinary warnings. *Dynamics Corp.*, 296 NLRB 1252 (1989). In *Dynamics Corp.*, an employer unlawfully implemented a stricter enforcement of attendance and punctuality rules. The Board held that warnings issued pursuant to the stricter enforcement of the rules violated the Act and could not form the basis of a discharge.

[24] As we have found that the Respondent has not established that it would have implemented the appearance guidelines and disciplined and discharged McHale in the absence of his protected activities, we find it unnecessary to address the judge's subjective characterization of McHale's appearance as ''grotesque'' and ''frightening.''

[25] Nolan admitted that in his meeting with McDowell on December 9, 1987, he stressed that ''we were not there to negotiate appearance guidelines.'' Therefore, the Respondent's announcement of its appearance guidelines in advance of implementation did not satisfy its obligation to offer the Union an opportunity to bargain over that subject. *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 fn. 1 (1987). Furthermore, the Respondent does not contend that it in fact bargained with the Union over the guidelines.

[26] 245 NLRB 561, 567–568 (1979), enfd. in relevant part 751 F.2d 1571 (11th Cir. 1985).

whether the ''union understand[s] and agree[s] that employers, generally, have a right to implement reasonable rules to try and improve their image with the public?'' Rossa responded that ''[e]mployers have a right to implement rules that are reasonable, yes.''

We find that neither Rossa's nor McHale's testimony constitutes an admission that the Union had waived its rights to bargain concerning the implementation of the appearance guidelines. Rossa and McHale merely acknowledged that the Union recognized in general the need of an employer to implement certain reasonable rules. At no point did they concede that under the collective-bargaining agreement the Respondent could implement rules, reasonable or otherwise—or, in particular, appearance guidelines–-without giving the Union an opportunity to bargain regarding those rules. In any event, the Union would be entitled to challenge the appearance guidelines on the basis that they were in whole or in part unreasonable work rules. Accordingly, the testimony of Rossa and McHale does not establish that the Union clearly and unmistakably waived its right to bargain over the appearance guidelines.

The Respondent argues that the management-rights clause of the collective-bargaining agreement gives it the right to implement reasonable rules unilaterally, including the appearance guidelines. The management-rights clause reads as follows:

> The management of the Company and the direction of the working forces, including the right to hire, suspend, discharge for proper cause, promote, demote, transfer, relieve employees from duty because of lack of work or for other proper and legitimate reasons, are recognized to be reserved to the Company, except as otherwise provided in this agreement.

The judge found, and we agree, that the management-rights clause, alone, would not give the Respondent the right to impose the appearance guidelines unilaterally. We note that the management-rights clause is a statement, in general terms, that the Respondent has the right to manage the Company and direct the work force and does not make any specific references to appearance guidelines. It does not recite that management has the right to adopt and enforce rules with (or without) notice to the Union. We therefore find that the management-rights clause does not constitute ''an express, clear, unequivocal, and unmistakable waiver by the Union of its statutory right to bargain about the [r]espondent's implementation'' of the appearance guidelines. See *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). See also *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985); *Kansas Education Assn.*, 275 NLRB 638, 639 (1985).

The Respondent argues that ''uncontradicted record evidence concerning bargaining history and past practice'' confirms that it has the right to unilaterally establish reasonable work rules. The Respondent points to its policy manual, which it states contains a large number of unilaterally implemented policies concerning safety and work rules. The Respondent also states that its right to implement these policies has been upheld by arbitration. Hardman, however, testified that it is common for Local 1956 to assert that it wants to negotiate over materials covered in the policy manual. In any event, we find that any past union acquiescence in the Respondent's unilateral implementation of particular work rules does not constitute a waiver of the Union's right to bargain over the implementation of the appearance guidelines. See *Johnson-Bateman*, supra.[27]

Hardman also testified that arbitrators have ruled on whether ''the [R]espondent] has the right to promulgate, issue and enforce reasonable rules and regulations regarding the direction of the working forces.'' The only arbitration decision in evidence, however, is the one in this case (i.e., relating to McHale's discharge), in which the arbitrator found that the management-rights clause gave the Respondent the right to implement the appearance guidelines unilaterally. As previously noted, we have not deferred to that decision. Further, there is testimony regarding only one other arbitration decision; and neither it nor the contract under which it was made is in evidence.[28] Therefore we cannot find that arbitration awards have established a pattern ''clear enough to convert the Union's silence into binding waiver.'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983).

We also reject the Respondent's claim that the appearance guidelines are ''simply an amplification of existing job description requisites.'' As the Board noted in *Johnson-Bateman*, supra at 188, ''a union's past acquiescence in an employer's unilateral action on a particular subject generally does not, without more, constitute a waiver by that union of any right it may have to bargain about future action by the employer in that matter.'' In *Owens-Corning Fiberglass*, 282 NLRB 609 (1987), the Board majority stated that ''[a] union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'' [Citations omitted.]

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[27] We also note that one of the Respondent's own internal communications reveals its awareness that past union conduct was in no way indicative of a disposition to accept unilateral action by the Respondent on the appearance guidelines. Thus, in his memorandum of November 4, 1987, Hardman stated that he would ''anticipate a Local #1956 challenge on the basis of a unilaterally imposed change in 'working conditions' and/or as an unwarranted extension of management's rights.''

[28] Art. IX, par. 2, of the present collective-bargaining agreement states that any findings made or conclusion reached by the arbitrator under that article ''shall be final and binding upon the parties for the duration of the Agreement.''

We find that the Union did not waive its right to bargain over the implementation of the appearance guidelines. We therefore conclude that by unilaterally implementing the appearance guidelines the Respondent violated Section 8(a)(5) and (1) of the Act.[29]

## CONCLUSIONS OF LAW

1. At all material times International Brotherhood of Electrical Workers, Local 1956, AFL–CIO–CLC has been the exclusive collective-bargaining representative of certain employees of the Respondent within the meaning of Section 9(a) of the Act.

2. By unilaterally promulgating appearance guidelines that became effective July 1, 1988, without first bargaining with the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

3. By enforcing the unilaterally promulgated appearance guidelines against employees, including disciplining and discharging James McHale, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By impliedly threatening employees with unspecified reprisals if they continue to engage in union and/or other protected concerted activities including, but not limited to, the filing of grievances, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By impliedly threatening employees with unspecified reprisals if they file charges or give testimony under the Act, the Respondent has engaged in and is engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By implementing and enforcing appearance guidelines, including discipline imposed on McHale, because McHale and other unit employees engaged in union and/or other protected concerted activities and in order to discourage employees from engaging in that activity, the Respondent has engaged in and is engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. The Respondent has not committed any other alleged unfair labor practices.

[29] We have found that the Respondent's implementation of the appearance guidelines violated Sec. 8(a)(5) of the Act. The Board has applied the following test for determining whether discharges or other disciplines violated Sec. 8(a)(5) of the Act: if an employer's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violates Sec. 8(a)(5) of the Act. *Great Western Produce*, 299 NLRB 1004, 1005 (1990). See also *McCotter Motors Co.*, 291 NLRB 764 fn. 4 (1988). Here, the complaint did not specifically allege that McHale's discharge violated Sec. 8(a)(5). The complaint alleged, however, and the General Counsel proved, that the implementation of the appearance guidelines violated Sec. 8(a)(5), and the Respondent concedes that McHale was disciplined and discharged pursuant to those guidelines. Under these circumstances, we find that the Respondent's discipline and discharge of McHale violated Sec. 8(a)(5) of the Act.

## REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(5), (3), and (1) of the Act, we shall order it to cease and desist, and to take certain affirmative action to effectuate the policies of the Act. The Respondent unlawfully and unilaterally instituted appearance guidelines effective July 1, 1988. We shall order the Respondent to cease and desist from unilaterally instituting any such guidelines. Affirmatively, we shall order the Respondent to rescind the July 1, 1988 appearance guidelines and bargain with the Union about any future implementation of any such guidelines governing employees represented by the Union.

We shall also order that the Respondent fully restore the status quo ante as of the time of its unlawful actions by expunging from the files of employees all memoranda, reports, and other documents resulting from the application of the guidelines, and notify the affected employees, in writing, that this action has been taken. We shall also order the Respondent to offer James McHale immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered because of the discrimination against him, less any net interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

## ORDER

The National Labor Relations Board orders that the Respondent, Equitable Gas Co., an Operating Division of Equitable Resources, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing and enforcing appearance guidelines.

(b) Impliedly threatening employees with unspecified reprisals if they continue to engage in union and/or other protected activities, including, but not limited to, the filing of grievances.

(c) Impliedly threatening employees with unspecified reprisals if they file charges or give testimony under the Act.

(d) Instituting and enforcing appearance guidelines, including disciplining and discharging employees, because unit employees engage in union and other protected concerted activities, and to discourage unit employees from engaging in such activities.

(e) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the July 1, 1988 appearance guidelines as to employees represented by the Union, and bargain with the Union about any future implementation of any such program.

(b) Remove from its files any reference to counseling or discipline, including the discharge of James McHale, resulting from the application of the guidelines and notify each affected employee in writing that this action has been taken and that evidence of his or her unlawful warnings or discharge will not be used as a basis for future personnel action against him or her.

(c) Offer James McHale immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Pittsburgh, Pennsylvania facilities copies of the attached notice marked ''Appendix.''[30] Copies of the notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to bargaining unit employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly threaten employees with unspecified reprisals if they continue to engage in union and/or other protected activities, including, but not limited to, the filing of grievances.

WE WILL NOT impliedly threaten employees with unspecified reprisals if they file charges or give testimony under the Act.

WE WILL NOT unilaterally and without bargaining with International Brotherhood of Electrical Workers, Local 1956, AFL–CIO–CLC institute, implement, and enforce appearance guidelines.

WE WILL NOT institute and enforce appearance guidelines, including disciplining and discharging employees, because unit employees engage in union and other protected concerted activities, nor to discourage unit employees from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the appearance guidelines that we unlawfully put into effect on July 1, 1988.

WE WILL bargain collectively on request with the Union with respect to any similar guidelines, as the exclusive representative of the employees in the appropriate unit.

WE WILL remove from the files of employees any reference to counseling or discipline resulting from the application of the appearance guidelines. WE WILL notify each of them that we have removed from our files any references to his or her failing to comply with the appearance guidelines and that these will not be used against him or her in any way.

WE WILL offer James McHale immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and WE WILL make him

whole for any loss of earnings and other benefits resulting from the actions taken against him as a result of his refusal to comply with the July 1, 1988 appearance guidelines, less any net interim earnings, plus interest.

EQUITABLE GAS COMPANY, AN OPERATING DIVISION OF EQUITABLE RESOURCES, INC.

*Suzanne C. McGinnis, Esq.*, for the General Counsel
*Henry J. Wallace Jr., Esq.*, of Pittsburgh, Pennsylvania, for the Respondent.
*James G. McHale*, of Pittsburgh, Pennsylvania, pro se.

## DECISION

DAVID L. EVANS, Administrative Law Judge. This matter under the National Labor Relations Act (the Act) was tried before me on August 1–3, 1989, in Pittsburgh, Pennsylvania. James G. McHale, an individual, filed charges against Equitable Gas Company, an Operating Division of Equitable Resources, Inc. (the Respondent)[1] in Case 6–CA–21147–2 on July 26, 1988,[2] and International Brotherhood of Electrical Workers, Local 1956, AFL–CIO–CLC (the Union) filed charges against Respondent in Case 6–CA–21182 on August 12. An order consolidating cases and a consolidated complaint (the complaint) issued on December 20. The complaint alleges violations of Section 8(a)(1), (3), (4), and (5) of the Act in various particulars. Respondent duly filed an answer to the complaint admitting jurisdiction and the status of certain supervisors under Section 2(11) of the Act,[3] but denying the commission of any unfair labor practices.[4]

On the entire record, and my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a corporation with an office and place of business in Pittsburgh, Pennsylvania, is engaged as a public utility in the transmission, distribution, and sale of natural gas. During the 12-month period ending June 30, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000 and purchased and received at its Pennsylvania locations natural gas and other products valued in excess of $50,000 directly from suppliers located outside Pennsylvania. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *Facts*

Respondent employs approximately 900 employees, most of whom are represented by 6 different unions. Respondent has recognized the Union herein as representative of its approximately 280 clerical employees since 1952, and that recognition has resulted in a succession of contracts to date. The clerical employees are located at Respondent's central office in downtown Pittsburgh and in various other offices in the Pittsburgh area. One such employee is Charging Party McHale.

While there are, of course, other aspects of this case, the matters in dispute principally revolve around McHale's insistence on wearing a hair and beard combination that, as I stated on the record, would properly be characterized as falling somewhere between ''grotesque'' and ''frightening.'' As I stated on the record, my opinion in this regard is based on photographs in evidence and record descriptions of how McHale had worn his hair and beard at the times in question; these descriptions include the description by McHale.

McHale, who was 47 at time of trial, has been employed by Respondent for 29 years. He is classified as a credit fieldman. As a credit fieldman, McHale goes about the Pittsburgh area, mainly on the south side of the city, and attempts to locate individuals or companies who are stealing gas, either by partial or total diversion around meters, or by the use of false names, or by other schemes.

At time of trial McHale was on the Union's seven-member executive board, a chief steward, and steward for the credit field division. He had held these offices for 2 years; from 1978 through September 1987, McHale was the Local's president. For 5 years prior to his union presidency, McHale was a member of the executive board. McHale testified that the executive board makes the ''larger type decisions'' and constitutes, of itself, the Union's contract negotiating committee.

McHale has been a most active participant in the activities of the Union; the most salient of his activities include:

1. According to his estimation, which was not challenged, McHale participated in the handling of 500 grievances over an 18-year period.

2. In the last several years he acted as the ''presenter'' of the Union's case in all arbitrations except for those directly involving himself and those which, according to his testimony, ''were over my head.''

3. In 1987 McHale acted as the Union's chief spokesman in opposing a management plan whereby employees would be given cash in return for seeking out and finding, on their own time, gas thieves.

4. In 1988 McHale acted as a spokesman for the Union, and presented a grievance at arbitration over Respondent's plans for handling plumber inspection calls. (These calls were made by area plumbers for inspections of new gas connections.) At the arbitration the parties reached a verbal agreement; but then McHale demanded a liquidated damages clause. This angered Milantoni. Eventually, on July 21, the

[1] The caption has been changed to correctly reflect Respondent's true corporate names, as indicated by Respondent's answer.

[2] All dates are in 1988 unless otherwise indicated.

[3] Admitted supervisors within Sec. 2(11) of the Act include: J. V. Milantoni, president of the Company; Willard M. Hardman, manager of labor relations; and E. M. Nolan Jr., director of the customer services division.

[4] In the answer Respondent further moves that the Board defer this matter to a decision that was rendered pursuant to the arbitration processes to which Respondent and the Union are parties. Deferral is inappropriate in cases where, as here, there is an allegation of Sec. 8(a)(4) of the Act; this is so even if the allegation is ultimately found to be without merit. *United Parcel Service*, 260 NLRB 11 (1982), citing *Filmation Associates*, 227 NLRB 1721 (1977). Therefore, Respondent's motion is denied.

Union backed down and agreed to sign off on the original agreement.

5. In early 1988, McHale acted as union spokesman in opposing a management plan for voluntary training on off hours.

6. In 1985, McHale wrote a letter to the United Way threatening to handbill the United Way unless the Salvation Army quit leasing space to Respondent. (The space was used by nonunit employees, University of Pittsburgh students, for assisting indigents in working out payment schedules.) Hardman threatened to discharge McHale if he did not issue a retraction, which McHale did.

7. McHale sponsored and participated in opposition to various other of Respondent's programs over the years.

8. On June 28, 29, and 30, and on July 14 and 15, McHale presented the Union's case at a Board hearing on a union unit clarification petition involving Equitrans, a company that the Union contended, and Respondent denied, was a joint employer with Respondent.

On June 13, Respondent notified the Union that, effective July 1, it was establishing its ''Customer Service Department Appearance Guideline.'' The stated policy covers dress and grooming; it reads, in relevant part:

> Employees are to be neat and clean at all times and are to present a businesslike appearance. Extreme appearance such as unkempt, bushy facial hair or unconventional hairstyle is unacceptable.
>
> . . . .
>
> *Review Procedure*
>
> Management shall have the final approval, subject to the applicable grievance procedure, as to whether or not a particular appearance or piece of apparel is appropriate for a position.
>
> Counseling for the first offense of a violation of these appearance standards will apply. Subsequent offenses will be subject to the General Disciplinary Policy.

The appearance guidelines were subsequently imposed on all other of Respondent's 900 employees. The complaint alleges that, as to the clerical employees, the appearance guidelines were unilaterally implemented in violation of Section 8(a)(5) of the Act. Respondent contends that, under the management-rights clause of the contract, it had the right to implement the appearance guidelines unilaterally. That clause reads:

> The management of the Company and the direction of the working forces, including the right to hire, suspend, discharge for proper cause, promote, demote, transfer, relieve employees from duty because of lack of work or for other proper and legitimate reasons, are recognized to be reserved to the company, except as otherwise provided in this Agreement.

Some discussions with the Union did precede the implementation of the appearance guidelines, but these need not be detailed as Respondent does not contend that it bargained with the Union beforehand. (Certainly there is no contention that there was any agreement on the guidelines before the implementation which came during the contractual period.)

McHale, and only McHale, was disciplined pursuant to this policy. As alleged and admitted, McHale received the following discipline: verbal warning on July 18; written warning on July 20; 1-day suspension on July 25; 10-day suspension on July 29; 30-day suspension on August 16; and discharge on October 31.

Pursuant to an arbitration decision dated April 7, 1989, McHale was reinstated, but without backpay, after he trimmed his hair and beard. The arbitration decision further held that Respondent had the right, under the above-quoted management-rights clause, to impose unilaterally the appearance guidelines.

General Counsel contends that Respondent's actions toward McHale were unlawfully motivated. In support of that contention, General Counsel relies, in part, on testimony about a meeting conducted by Respondent on July 21. McHale testified that Hardman spoke from prepared notes and Hardman

> [s]tarted out saying that he felt that he had failed in his position as a labor relations person because the labor relations of the company and the union were in such disarray. He also stated that the number of labor charges that the Union had filed, the number of grievances that the Union had filed, that they were like taking pot[5] shots at the—at the company. And the company was very . . . disturbed by this. And that now they were going to arm the rabbits with guns of their own. He then stated that [the] newly hired Mr. Alexander had already showed him some tricks on how the handle the union since he's been there, which was only a short period of time. Mr. Hardman did list the various labor charges and/or grievances that were giving the company this . . . hassle. He said that . . . out of the six unions on the property, we were the only union that [was] giving the company a hard time and challenging them on anything that they wanted to do. And that . . . they wanted us to get on board.

McHale listed as ''hassle'' topics mentioned by Hardman were plumber inspection calls, theft incentive program, nut guard installation by meter readers (otherwise unexplained), homework by employees, off hours voluntary training, ''the Salvation Army situation,'' the no-smoking or drinking policies, and the unit clarification petition. About that, McHale testified, ''Mr. Hardman stated that the formation of Equitrans would probably be better off for all concerned . . . . [T]he company didn't like the union's actions in challenging everything that they do, and that was one of the items which was stated about the UC hearing itself.''

Finally, McHale testified that Hardman stated in regard to the appearance guidelines, ''[b]ecause of the adverse publicity that the Equitable Gas Company had received from the . . . Pennsylvania Public Utility Commission, that they felt that it was necessary to . . . improve the appearance of its employees.''

George McDowell, current union president, testified that at the July 21 meeting Hardman mentioned several topics at which the Union and Company had been at disagreement. McDowell did not testify that the unit clarification case was mentioned by Hardman. McDowell testified that Hardman

[5] The transcript, p. 35, L. 14, is corrected to change ''pop'' to ''pot.''

characterized the Company as ''rabbits'' and stated that the Company was ''going to arm the rabbits and let them shoot back.''

General Counsel also called Lawrence Rossa, an International representative of IBEW, to testify about the July 21 meeting. Rossa first testified that as International representative he services the Local ''in contract negotiations and contract interpretations and their grievance procedure.'' Rossa testified that Hardman read from a paper and:

> [H]e said that he was disappointed because of the relationship . . . between the two parties hadn't improved. He did state that he wasn't going to mention about a unit clarification meeting that was before the Board. It was pending, so he wasn't going to get into particulars in regards to that particular case. But he was going to . . . touch on numerous subjects. He said that he was disappointed because the union had filed so many grievances and they were pending and . . . because the union had filed so many unfair labor charges against the company . . . . Mr. Hardman made a statement in regards to the union election that Mr. McHale, Jim McHale, was a past president of the local union, and that he sought not to seek re-election . . . and he was . . . elected as the executive board member, that he was running the local union through the executive board and through George McDowell, who was the local union president. He then went on to say that the company was unhappy in regards to all the unfair labor charges being filed against the . . . company . . . . [H]e felt that McHale had embarked upon a campaign against the company in regards to these unfair labor charges. He . . . made a statement that the union, in going to the Labor Board, was like shooting rabbits. That they would go to the Board, and they would take a shot at a rabbit and miss, being unsuccessful at the Board. They would take another shot at a rabbit, file another charge, and they would miss. And then they would shoot at another rabbit and be successful. And then he said that . . . the company now was prepared to arm the rabbits.

Then, further according to Rossa, Hardman referred to Alexander who, ''[w]as giving the company some new ideas to use against the union; ideas that they hadn't even thought of, and Mr. Hardman hadn't even thought of himself.''

Finally, General Counsel called Mary Piacenza to testify about Hardman's speech. At the time of the speech, Piacenza was the Union's recording secretary, and she took notes. Without her notes before her, Piacenza testified:

> Willard Hardman, who is the manager of labor relations, opened the meeting by stating it was an off-the-record meeting. He then went on to list the problems that the labor relations have had with . . . our local union, IBEW 1956. He listed that . . . we had filed so many number of labor charges, I think the number was seven, and grievances for a certain amount of time. And . . . they had tried to institute policies without negotiation, and the union would question these things. Some of the problems were the no smoking policy, the aliases, . . . homework policy, the plumber inspection calls, just various things that the union had questions on, and the company did not want us to raise questions on it. So, he went through it and he said that we were going to have to start cooperating and working with each other. And he said that the company, they think they have to change, but they know that the union has to change in their approach. He also stated that . . . the local union has been taking pot shots at them. Well, now they were going to arm the rabbits and . . . they're going to accelerate the changes. They were going to . . . turn up the heat, and then—and inform the employees.

When asked if Hardman mentioned what type of ''changes'' Respondent had in mind, Piacenza replied. ''Automation. He mentioned that had hired a—a Mr. Robert Alexander from Fisher Scientific. He knew a few tricks on things to—to do to the union.'' When asked if Hardman mentioned the unit clarification proceeding, Piacenza replied, ''He did mention Equitrans, but he did say that that was a separate issue and it wasn't going to be discussed at that meeting.''

While on cross-examination, Piacenzo produced her notes of the meeting. They are fully consistent with her testimony.

Hardman testified that he spoke from an outline which was received in evidence. He testified that he deviated from the outline on three points. According to Hardman:

> The three areas [were], I made a reference to Mr. Alexander knowing a few tricks. I made a reference to arming the bunnies . . . and having them shoot back. And I also explained that, in no way, were were [sic] suggesting that the Union was doing anything improper by utilizing the processes of the Labor Board, and that, in fact, many of the other unions that we have satisfactory relationships with used the processes of the Board.
>
> . . . .
>
> And what I was saying was that, essentially, the union had been taking pot shots at the company. That we have been very successfully defending those pot shots, but at some point in time, in the very near future, that we could become more offensive in our dealing with them. And, in effect, we'd arm the bunnies and the bunnies would start shooting back.

When asked on direct examination if he said how this ''shooting back'' would take form, Hardman testified that he did; he told the gathering that the adversarial relationship that had developed between Respondent and the Union ''might serve as an incentive for the company to'': (1) speed up the inevitable process of eliminating unit work by automation; (2) exercise its contractual rights to contract-out unit work; (3) insist, in future contract negotiations, on elimination of checkoff and union shop; and (4) be more aggressive in communicating directly with unit employees.

Hardman denied mentioning McHale; he did acknowledge that:

> I made the comment that we do not perceive the problem with the unit as resting with the employees. I commented, as a matter of fact, I thought we had a very competent and cooperative and loyal work force. And that the employees had given the signal by the change of officers in the last election, that they were tired of the confrontation, and that Mr. McDowell had,

in fact, run for office generally on that theme and that campaign promise.

Hardman testified that, in listing points of contention which he sought to smooth over, he followed his outline which states:

A. Non-functioning grievance Procedure—reviews—same shit—over-technical—does not serve purpose of resolving problems.

B. Opposition to all programs:

No drinking
Software pledge
Theft incentive pilot program
No smoking
Employee identification
Employee prospect—insurance
Appearance guidelines
Plumber inspection
Homework
Voluntary customer service training
Guard nuts
General disciplinary policy—ban on guns
Pitt/Salvation Army—indigent review program
Who cares, we care—[Union] told People not to participate
Non-participation in breakfast meetings: ''Undo what we are trying to accomplish''
Negative consistency—no common ground

C. Excessive litigation

Active NLRB cases—7
12 others since 1981

McDowell and Piacenza were called in rebuttal by General Counsel. Both employees credibly denied that Hardman made any mention of use of Board processes by any union other than the Union herein.

The July 21 meeting was conducted the day after McHale received the written warning for violation of the appearance guidelines. Rossa testified that after the meeting he, McDowell, and McHale went to the restroom at the same time. According to Rossa:

> And as we were walking to the men's room, John Milantoni was standing there with a group of management. . . . As we approached the group, John Milantoni . . . stepped away from the group and commented to Jim McHale, ''I see you haven't shaved your beard off yet.'' And Jim responded to him, ''No, I haven't, and I have no intentions to.'' And Mr. Milantoni responded, ''Good.''

Neither McHale nor McDowell were asked about this incident. Milantoni testified that he did see McHale in the restroom after the meeting, but he testified that he could not remember any exchange of words; he did not deny Rossa's testimony.

Another exchange introduced as evidence of specific animus against McHale was between McDowell and Hardman. McDowell testified that in June 1988 he and Hardman had a telephone conversation after the settlement of the grievance on plumber inspection calls. McDowell testified that Hardman stated that Milantoni was ''incensed'' over McHale's handling of the arbitration and settlement and that Hardman, himself, felt that ''a lot of our problems stemmed from McHale.'' Hardman did not deny this testimony, and I found McDowell credible on the point.

Finally, General Counsel introduced as animus against McHale evidence of a July telephone call between McHale and Milantoni. McHale testified that in that conversation Milantoni acknowledged responsibility for the beard and hair section of the appearance code. I believe McHale on this point, even though Milantoni denied it. However, I do not believe McHale's further testimony that Milantoni also added categorical threats to take further action against McHale unless he stopped being so aggressive in his union activities. General Counsel did not allege any remark by Milantoni to be a violation; McHale was evasive to the point of disbelief when asked (by both me and counsel for General Counsel) to be specific about just what the threat was; and Milantoni did credibly deny that he told McHale anything to the effect of what McHale attempted to convey.

### B. *Analysis and Conclusions*

The complaint alleges that, in violation of Section 8(a)(1) of the Act, Respondent, by Hardman in the July 21 speech:

> (a) Impliedly threatened employees with unspecified reprisals if they continued to engage in union and/or other protected concerted activities including, but not limited to, the filing of grievances.
>
> (b) Impliedly threatened employees with unspecified reprisals if they filed charges or gave testimony under the Act.

The complaint further alleges that, by the discipline imposed on McHale, Respondent violated Section 8(a)(3) and (4) of the Act. Finally, the complaint alleges that in violation of Section 8(a)(5):

> Respondent refused to bargain with the Union before the implementation of the ''Appearance Guidelines'' . . . thereby depriving the Union of an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees in the [clerical] unit with respect to such acts and conduct and the effects of such acts and conduct.

Hardman's testimony made it clear enough that he was there at the July 21 meeting to castigate the union officers. In Hardman's opinion they had engaged in activities that had produced a setting of insufficient labor-management harmony. Not once in his diatribe did Hardman suggest that the activities of the employee-officers were sponsored by anything but a desire to advance the interests of the employees. In sum, Hardman was there to revile the officers for their protected concerted and union activities.

But Hardman did more than that; he threatened to retaliate in four different ways if the officers did not change their approach. These threats were premised, not only on the conduct at the plant, but on the protected activities of filing charges and giving attendant supporting testimony under the Act. Therefore, I must necessarily find that both the above-quoted 8(a)(1) allegations are fully supported.

However, in making these findings and conclusions, I do not credit McHale's testimony that Hardman listed as one of the ''hassles'' the unit clarification petition that was then in progress. McHale was flatly contradicted by the testimony of Rossa on this point, and further contradicted by the testimony and notes of Piacenza. Both Piacenza and Rossa testified that the UC petition was not going to be discussed; certainly they did not corroborate McHale's testimony that Hardman stated that the Union's UC petition was something that Respondent ''didn't like.''

Moreover, I do not credit Rossa's testimony that Hardman singled out McHale, by name, as a source of the tensions between the parties. Rossa was not corroborated on this point by any other of General Counsel's witnesses, and Hardman credibly denied mentioning McHale's name.

In regard to the allegations of discriminatory action in the imposition of discipline against McHale, the law is that the General Counsel has initial burden of establishing a prima facie case sufficient to support an inference that union or other activity that is protected by the Act was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). Once this is established, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.'' *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

McHale was quite active on the part of the Union, and Respondent admits knowledge of some, but not all, of this activity before announcement of the appearance guidelines. Specifically, Respondent denies knowledge of McHale's involvement in the UC proceeding before the appearance guidelines were announced on June 13. McHale admitted that he knew of no way that the Respondent could have known on June 13 that he was going to present the UC petition at the hearing which began on June 28. General Counsel does not suggest any method by which Respondent could have gained such knowledge before that hearing date, except by a process of inferences upon inferences. Therefore, McHale's involvement in the UC proceeding could not have been a factor in the implementation of the appearance guidelines pursuant to which he was disciplined.

Respondent knew of McHale's other activities listed above before the guidelines were implemented, and it is clear that Respondent was not happy about McHale's involvement in those activities. Indeed, Hardman included reference to some of the activities directly attributable to McHale in this diatribe of July 21 and his implied threats to get tough. However, there is no evidence that such activities (or any other protected activities by McHale) had engendered in Respondent that degree of animus which would cause an employer to discriminate against an employee.[6] Due to this failure of proof of animus, I find and conclude that General Counsel has not proved a prima facie case of unlawful discrimination against McHale.

Moreover, even assuming that a prima facie case existed, it is more readily inferable that Respondent was motivated by a simple desire to get McHale, like all other of its approximately 900 employees, to present a nonbizzare appearance. That is, Respondent has met any burden imposed by *Wright Line*, and General Counsel has failed to rebut Respondent's evidence.[7] For this reason, as well as there not being a prima facie case of unlawful discrimination against McHale, the 8(a)(3) and (4) allegations of discrimination against McHale must be dismissed.

Likewise, the 8(a)(5) allegation must be dismissed. While waiver of a bargaining right will not lightly be inferred, waiver can be found either in the express language of a collective-bargaining agreement or in the bargaining history of the parties. *Rockwell International Corp.*, 260 NLRB 1346 (1982), and cases cited infra. While the authorities would not countenance a holding that the above-quoted management-rights clause, standing alone, gives Respondent the right to impose the appearance guidelines,[8] testimony by McHale and Rossa make it clear that the Union had historically waived its rights to bargain about the matter, as Respondent contends.

Rossa testified that, as International representative, he services the Union ''in contract negotiations and contract interpretations and their grievance procedure.'' McHale testified that, in his 16-year tenure of service for the Local, he had been president, and had been and was, at time of trial, a member of the Local's executive board, which makes the Local's ''larger type decisions'' and which constitutes, of itself, the Union's contract negotiating committee. Thus, both of these witnesses called by General Counsel were imminently qualified to testify as to the Union's position as to what the contract had come to mean to the parties.

Both Rossa and McHale acknowledged that Respondent has the right to impose ''reasonable'' disciplinary rules. Rossa and McHale would not have made this admission were it not a true statement of what had come to pass in the parties' bargaining history. Once these admissions were made, Respondent was relieved of the obligation of coming forward with other testimonial or documentary evidence of precisely when and how it was in the parties' bargaining history that the Union consciously waived its rights to object to unilateral implementation of disciplinary work rules. Or, to put it in terms articulated by *Rockwell International Corp.*, supra, with the admissions by Rossa and McHale, Respondent was relieved of the obligations of coming forward with evidence that, at some point in the past, the matter was fully discussed and consciously explored during negotiations and the Union consciously yielded or clearly and unmistakably waived its interest in the matter.

In summary, with the concessions by Rossa and McHale that Respondent had the right unilaterally to impose disciplinary work rules, Respondent cannot be said to have acted

[6] Cf. *Fibracan Corp.*, 259 NLRB 161 (1981).

[7] Respondent's evidence was that it wanted a better image projected by all of its employees.

[8] *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982), and cases cited infra.

unlawfully just because the Union, post hoc, disagreed with the ''reasonableness'' of a particular rule.[9]

[9] Post hoc inquiries about reasonableness are the proper province of arbitrators, as the Union necessarily recognized by its pursuit of the grievance mentioned above.

Accordingly, I shall recommend that the 8(a)(5) allegation of the complaint be dismissed.

[Recommended Order omitted from publication.]